IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1162

JONES TRANSFER COMPANY,
CENTRAL TRANSPORT, INC.,
AND U.S. TRUCK COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY TO BRIEF OF FEDERAL RESPONDENTS

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ARGUMENT

The entire basis for the actions of the Interstate Commerce Commission here under review has been seriously called into question by the Commission's attempt on brief to explain away a patent inconsistency

[1] The Federal respondents submitted a combined brief in opposition to petitions for certiorari in Nos. 77-1162, 77

in the decisions below. At page 11, the Commission has effectively conceded that there is a clear contradiction between its statement in the reports below that "the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard" (73a, 139a, 168a) and the specific definition of spotting adopted by these reports, 49 C.F.R. 1307.35(e)(2)(2)(f). Because holding yards are operated by carriers or their agents, petitioners have urged that trailers parked in holding yards cannot be considered to be "in full possession of the *** consignee *** unattended by carrier's employee," as required to come within the definition of spotting in Section 2(f). (Pet. 10-13, 20) However, the language quoted above, embracing all three Commission reports, finds that all loaded trailers dropped in holding yards are spotted, regardless of the fact of the carrier's continuing control over the trailers.

On brief, the Commission at no point argues that the adopting language quoted above is consistent with the spotting definition in Section 2(f). Rather, the Commission now argues at page 11 that it never intended for the two provisions to be consistent. According to the Commission, the quoted language from the reports "does not purport to recapitulate the entire spotting definition," and should not be read as superseding it. In other words, the Commission does not argue that the spotting definition and the adopting language are consistent, but rather takes the view that the Court should resolve any inconsistencies in favor of the spotting definition.

Taken literally, the position advanced at page 11 would consider "a loaded trailer dropped in the consignee's holding yard" to be spotted only if the holding yard was completely unattended by carrier

employees. If carrier employees were in attendance, the trailer would not be deemed spotted, the carrier's line-haul obligation would not cease, and delivery of the trailer to the point of unloading would be performed without extra charge. Thus, the very practices which the Commission criticized so vehemently in its reports below could continue unabated under the interpretation advanced by its counsel on brief.

The sheer ludicrousness of this result supports petitioners' contention that the Commission's actions in this matter have been arbitrary, capricious, and lacking in reasoned basis. The Commission brief is obviously grasping for any possible method of rationalizing the patent inconsistency between the proposed rule defining spotting and the reports issued in support of its adoption. The quoted language in these adopting reports was in no way characterized as only a partial description of the spotting definition, as urged by the Commission at page 11. The Commission reports show a clear intent to terminate all line-haul service upon placement of a loaded trailer in a consignee holding yard, yet inexplicably the proposed rule did not achieve this goal. The convoluted construction urged by the Commission at page 11 in no way resolves the conflict between the rule and the adopting reports.

Similar attempts to find reasoned bases for action where none exist are found elsewhere in the Commission brief. For example, at page 12, footnote 11. the Commission claims that contradictory language in the first and second reports dealing with detention with power provisions was rendered inapplicable "because the spotting definition was revised in the third report." In fact, the third report revisions bore no relation to

detention with power. (166-67a)[2] In their petition for certiorari, these petitioners urged the Court to find the decisions below to be arbitrary and capricious due to the internal inconsistencies and lack of reasoned basis for the Commission's action. The Commission's brief is little more than an effort to supply reasoned bases for this action where none exist, or to actually modify the Commission's decision through statements on brief. Such an effort clearly must be rejected. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-69 (1962).

CONCLUSION

For the reasons stated above, as well as those stated previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Similarly, at page 9, the brief states that the Commission reports discussed "the need to create an incentive to avoid wasteful delays during detention," but fails to cite any record authority or otherwise explain the completely erroneous finding in the third report (169a) that trailers parked in holding yards are not presently subject to detention penalty provisions. Compare, Pet. 13,22.

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